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In the Supreme Court of the United States

OCTOBER TERM, 1968

LTV ELECTROSYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A35–A36) is reported at 388 F. 2d 683. The decisions and orders of the Board are set forth at Pet. App. A1–A34.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1968, and a petition for rehearing or for rehearing *en banc* was denied on April 18, 1968 (Pet. App. A37–A38, A41–A42). The petition for a writ of certiorari was filed on July 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

316-197—68

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. B1.

QUESTIONS PRESENTED

1. Whether the Board properly overruled the Company's objections to a representation election and certified the Union as bargaining representative.

2. Whether an employer is entitled to a formal hearing on objections to a representation election where such objections fail to raise any substantial and material issues of fact.

STATEMENT

Petitioner's Greenville, South Carolina, plant was established early in 1965, pursuant to a contract with the United States Air Force for the repair and overhaul of military aircraft. On July 1, 1965, the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the "Union"), filed a petition with the Board requesting certification as the bargaining agent for a unit of the Company's employees. On October 26, the Regional Director directed that an election be held (J.A. 208–217). In the election conducted on December 10, the Union prevailed, by a vote of 210 to 115, with 21 ballots challenged (J.A. 218h; Pet. App. A1).[1]

[1] Previously, on November 15, the Company had requested the Board to review the Regional Director's decision directing an election. The Board granted this request insofar as it raised issues pertaining to the supervisory status of leadmen. In substance, the Company claimed that the leadmen were supervisors

The Company filed timely objections to the election, alleging, *inter alia*, that "by and through its organizers and agents and/or persons acting on its behalf," the Union had engaged in "illegal and unlawful conduct" by electioneering at the polls (J.A. 219). In regard to this objection, the Regional Director's investigation [2] disclosed that former employee Wayne England,[3] while waiting in line to vote, had made several remarks to other employees standing around him, urging them to vote for the Union and referring to the benefits which he believed would be forthcoming if the Union won. The Regional Director, finding no evidence that England was an agent of the Union, or that he had been acting in its behalf or at its request in making his remarks, concluded that such remarks "constitute no more than typical conversation between voters in line expressing their own feelings as to the issue at hand" (J.A. 222; Pet.

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within the meaning of Section 2(11) of the Act, and had spearheaded the Union's campaign. Extensive hearings on this issue were held, and the Board, on April 15, 1966, issued a decision (J.A. 217–218g) holding that the leadmen were employees, not supervisors, and ordering that their ballots, which had been impounded pending decision of the issue, be counted. The court of appeals concluded that "substantial evidence supports the Board's finding that these employees were properly included in the bargaining unit" (Pet. App. A36).

[2] The Company did not request a hearing. In its objections, filed April 29, 1966, it asked merely "that the Regional Director inquire into, investigate, and sustain these objections * * *" (Employer's Objections to Election of December 10, 1965, p. 3).

[3] England had been discharged, allegedly in an illegal manner, less than a month before the election, and was permitted to vote a challenged ballot (see Pet. App. A5).

App. A6). Accordingly, he overruled the objection and certified the Union (J.A. 227; Pet. App. A6, A10). Upon the Company's motion for reconsideration, the Regional Director adhered to his original conclusion, adding that, under the circumstances presented, England's conduct at the polls could not have affected the outcome of the election (Pet. App. A17). The Company's request to the Board for review was denied on the ground that it raised no substantial issues warranting review (Pet. App. A20).

The Company then refused the Union's request to bargain, the Union filed unfair labor practice charges, and a complaint was issued by the Board's General Counsel. Pursuant to the General Counsel's motion for summary judgment, the Trial Examiner issued an order to show cause why summary judgment should not be granted. After consideration of briefs and memoranda filed by the parties, the Examiner granted the motion for summary judgment. He concluded that, since the Company offered no newly discovered or previously unavailable evidence with respect to the issues already disposed of in the representation proceeding, an evidentiary hearing was unnecessary (J.A. 228–242; Pet. App. A24), and held that the Company had violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union (J.A. 235–236; Pet. App. A26). The Board affirmed the Examiner's conclusion and ordered the Company to bargain, upon request, with the Union (J.A. 243–244; Pet. App. A33–A34, A30). Upon review, the court of appeals enforced the Board's order. It held, *inter alia*, that the Company's exceptions to the Regional

Director's report "show no substantial and material issues of fact that could be resolved only in a hearing," and that therefore "the Board was not required to hold an evidentiary hearing" (Pet. App. A36).

ARGUMENT

The decision of the court of appeals turns solely upon the particular facts of this case, and is not in conflict with the decision of any other circuit. Accordingly, there is no occasion for further review.

1. Petitioner's contention (Pet. 8) that the Board refused to apply its own rule against electioneering at the polls is based on an incorrect factual premise. Contrary to the Company's view, the Regional Director, whose findings were accepted by the Board and the court of appeals, did not determine that England was engaged in "electioneering", but rather that his remarks constituted no more than "typical conversation between voters in line expressing their own feelings as to the issues at hand" (Pet. App. A6). Accordingly, the only question presented with respect to England's remarks is whether the Regional Director could reasonably conclude that, in the circumstances here, the remarks did not affect the outcome of the election. Such an issue does not warrant review by this Court.[4]

[4] In any event, the Regional Director's conclusions regarding England's remarks was clearly reasonable. He found that England was not an agent of the Union, but was merely voicing his views as an employee-voter on the election issues, a commonplace occurrence even in voting lines, in view of the importance of such issues to employees (Pet. App. A16). Contrary to the Company's contention (Pet. 9), the Regional Di-

The cases relied upon by the Company (Pet. 8–12) are distinguishable on their facts. Thus, in *Claussen Baking Co.*, 134 NLRB 111, a non-supervisory leadman, flanked by the plant operations manager and the company's sales supervisor, stood near the polls and urged employees, including several who were newly hired, to vote against the Union.[5] In *Star Expansion Industries Corp.*, 170 NLRB No. 47, undisputed evidence established that the employee was an agent of the union and had acted in its behalf in electioneering at the polls and in distributing campaign literature. Moreover, this employee had remained in close proximity to the polls during a substantial portion of the voting period, notwithstanding the Board agent's instructions, on three separate occasions, to leave the polling area. Finally, in *Milchem, Inc.*, 170 NLRB No. 46, and *Kilgore Mfg. Co.*, 45 NLRB 468, there was extensive electioneering at the polls by individuals who were clearly officials of the unions.[6]

2. Petitioner's contention (Pet. 12–13) that it was entitled to an evidentiary hearing on its objections is

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rector did not rest solely on the ground that England was not an agent of the Union, but went on to find that the nature of his actions were not such as would affect employee freedom of choice (Pet. App. A6, A17).

[5] In setting aside the election, the Board noted that, since the Union had lost by only one vote, the proscribed conduct could have affected the election results even if only one vote had been swayed by it (134 NLRB at 112). In contrast, in the instant case the Union won by 95 votes (J.A. 218h; Pet. App. A1).

[6] Petitioner's reliance on *Peerless Plywood Co.*, 107 NLRB 427 (Pet. 8, 11), is wholly misplaced. Since the gist of the Board's decision there was to create a limitation on captive audience speeches by an *employer* within 24 hours of an election, that case is totally inapposite.

without substance. The Regional Director found, and petitioner does not contest his finding, that there was no dispute as to the facts concerning England's actions—that the only issue related to the legal significance, if any, of his remarks. It is well established that, where no factual questions are presented, "a hearing is a senseless and useless formality." *National Labor Relations Board* v. *Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (C.A. 5).[7] Contrary to petitioner's assertion (Pet. 13), *National Labor Relations Board* v. *K.V.P. Sutherland Paper Co.*, 356 F. 2d 671 (C.A. 6), is not contrary. There, unlike here, it was found that the challenge to an election raised material issues of fact which required a hearing (*id.* at 674).[8]

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[7] In accord with this view of the validity of the Board's summary judgment practice are: *Macomb Pottery Co.* v. *National Labor Relations Board*, 376 F. 2d 450 (C.A. 7); *Neuhoff Bros. Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611 (C.A. 5), certiorari denied, 386 U.S. 956; *National Labor Relations Board* v. *Bata Shoe Company, Inc.*, 377 F. 2d 821, 826 (C.A. 4), certiorari denied, 389 U.S. 917; *National Labor Relations Board* v. *Puritan Sportswear Corp.*, 385 F. 2d 142 (C.A. 3); *National Labor Relations Board* v. *Cumberland Farms, Inc.*, 370 F. 2d 54, 55 (C.A. 1); *National Labor Relations Board* v. *Tennessee Packers, Inc.*, 379 F. 2d 172 (C.A. 6), certiorari denied, 389 U.S. 958. Moreover, the Board's Rules and Regulations explicitly provide for a hearing on objections to an election where they raise "substantial and material factual issues" (29 C.F.R. 102.69(c)).

[8] In addition, as the Trial Examiner noted, "It is established Board policy, in the absence of newly discovered or previously unavailable evidence, not to permit litigation in a complaint case of issues which were or could have been litigated in a prior related representation proceeding" (Pet. App. A23). That policy, the Examiner pointed out, "is applicable even though no

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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formal hearing on objections has been provided by the Board," since "[s]uch a hearing is not a matter of right unless substantial and material issues are raised" (*ibid.*). Cf. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 161–162.

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